

No. \_\_\_\_\_

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**DIVERSYFUND, INC., DF GROWTH REIT, LLC, DF  
GROWTH REIT II, LLC, DF MANAGER, LLC, CRAIG  
CECILIO, AND ALAN LEWIS,**

*Petitioners,*

*v.*

**UNITED STATES SECURITIES AND EXCHANGE  
COMMISSION,**

*Respondent.*

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On Appeal from the United States of America  
Before the Securities and Exchange Commission  
File No. LA-5266

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**PETITION FOR REVIEW OF ORDER BY THE U.S.  
SECURITIES AND EXCHANGE COMMISSION**

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Craig Cecilio and Alan Lewis*

## **PETITION FOR REVIEW**

### **I. INTRODUCTION.**

Petitioners DiversyFund, Inc., DF Growth REIT, LLC, DF Growth REIT II, LLC, DF Manager, LLC, Craig Cecilio, and Alan Lewis (collectively “Petitioners”), respectfully petition this Court pursuant to 15 U.S.C. § 77i (the “Securities Act”), 15 U.S.C. § 78y (the “Securities Exchange Act”), 5 U.S.C. §§ 702, 704, and 706 (the “Administrative Procedure Act”), and in accordance with Rule 15 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 15-1, to review Respondent, the U.S. Securities and Exchange Commission’s (the “Commission”) orders entitled: Amended Order Directing Private Investigation and Designating Officers to Take Testimony, entered on January 13, 2022, and Order Denying Petition for Review, entered on January 26, 2022 in the Administrative Proceeding File No. LA-5266 of the Commission, entitled *In the Matter of the Petition of: DiversyFund, Inc., et al.*

Venue is proper under the aforementioned statutes; all petitioners reside or have their principal place of business in this circuit and have petitioned within sixty days after entry of the orders petitioned from.

## **II. JURISDICTIONAL BASIS.**

This Court has jurisdiction to review the orders under 15 U.S.C. § 77i(a) and 78y(a), because the orders relate to securities registration exemptions and threatened enforcement under the securities laws. Petitioners' grievance results from the Commission's decision to disqualify it from offering and selling securities under Regulation A (17 C.F.R. §§ 230.251-230.263; "Reg A"). As explained more fully in the concurrently filed Emergency Motion to Stay, Petitioners' capital-intensive real estate business depends on its ability to raise capital to meet ongoing commitments, so the sudden deprivation of their Reg A exemption will very quickly put Petitioners out of business, irreparably injuring Petitioners and their nearly 30,000 individual investors.

## **III. PETITIONERS ARE ENTITLED TO REVIEW.**

For the reasons set forth in their December 13, 2021 Commission petition, and their motion to stay in this Court (filed concurrently with this Petition), Petitioners request that this Court review the legality of the Commission's decision to disqualify Petitioners' Reg A exemption without notice and a hearing before a neutral decision maker. This indefinite deprivation of Petitioners' property rights, with neither pre-

deprivation nor prompt post-deprivation process, violated Petitioners' due process rights. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"); *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *FDIC v. Mallen*, 486 U.S. 230, 242 (1988); *Barry v. Barchi*, 443 U.S. 55, 64 (1979). It also violates Petitioners' rights against arbitrary and capricious agency action. *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (before an agency acts it must, among other things, consider whether its decision impacts "reliance interests, determine whether they [are] significant, and weigh any such interests against competing policy concerns."). Petitioners relied on Reg A for years, and crafted a business model that depends on the availability of the exemption to access capital markets. When making its determination to disqualify Petitioner, with no finding of wrongdoing, the Commission gave no consideration to Petitioners' evidence concerning their reliance on access to capital markets, or the harm to 30,000 individual investors that will result from such an arbitrary and

capricious decision. This Court should therefore review the orders to determine their legality.

#### IV. CONCLUSION.

Based on the foregoing, Petitioners respectfully request this Court to exercise its power to review the Commission's orders under the Securities Act, the Securities Exchange Act, the Administrative Procedure Act, and in accordance with Rule 15 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 15-1. Petitioners intend to seek to recover fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, inasmuch as the Commission's position was not substantially justified.

Dated: February 15, 2022

Respectfully submitted,

BUCHALTER  
A PROFESSIONAL CORPORATION

By: /s/ Sanjay Bhandari  
SANJAY BHANDARI

*Attorneys for Petitioners*  
*DiversyFund, Inc., DF Growth REIT, LLC,*  
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*LLC, Craig Cecilio and Alan Lewis*

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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PETITION FOR REVIEW OF ORDER BY THE U.S. SECURITIES AND EXCHANGE COMMISSION

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